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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 141

LAUREL N. DUNN,

Petitioner

v.

NEWSPAPERS, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

LAUREL N. DUNN
2811 Old Robinson Rd.
Waco, Texas
Petitioner 76706

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. _____

LAUREL N. DUNN,

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v.

NEWSPAPERS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitoner, Laurel N. Dunn, prays that a writ of certoriari issue to review final judgment of The Supreme Court of Texas in overruling his Motion for Rehearing entered in the above entitled case on February 18, 1970.

Mr. Justice Black, upon Petitioner's in personam application by telegram filed April 29, 1970, on May 1, 1970, by order extended the time for filing a petition for writ of certiorari to and including July 18, 1970.

OPINION BELOW

Refusal of Writ of Error, in effect, affirmed judgment of Court of Civil Appeals, 446 S.W. 2d 101 (n.r.e.), upholding 2d 101 (n.r.e.), Appendix B, upholding summary judgment of District Court for respondent. Tr., p. 31, Appendix C (a), separately presented.

JURISDICTION

It is believed that 28 U.S. C., Sections 1257 (3) and 2106; Supreme Court Rule 19, paragraph 1 (a) and (b); Article I, U.S. Constitution; and First, Fourth, Fifth, Seventh, Eighth, Ninth and Fourteenth Amendments thereto; and perhaps 42 U.S. C. 1983 (Civil Rights Act), confer jurisdiction upon the Supreme Court to review the judgment in this case by writ of certoriari.

QUESTIONS PRESENTED

1. Whether issues of fact, including truth, privilege, motive, intent, interest of witnesses and "actual malice," did, in fact, exist, precluding disposition of summary judgment, in denial of Petitioner's rights secured by the Constitution?

2. Whether jury trial for damages against political Newspapers for interference with vote, election, reputation and constitutional rights, by published falsehoods, ballots, "write-in vote" and statements of fact thereon, made with "actual malice," as defined by New York Times rule, is among those "rights secured by the constitution," "basic to our civil and political institutions," "our system of jurisprudence," and "essential to fair and impartial trial," and constitutional election?

3. Whether New York Times Rule applies to action by congressional candidate for wrongful interference with vote, election, reputation, and constitutional rights, where Newspapers admits in its Answer "that the publication complained of in no way related to or questioned plaintiff's official conduct"?

4. Whether partisan Newspapers has a qualified privilege, or constitutional right to publish, with "actual malice," as defined by the Supreme Court, all manner of matter unrelated to

candidate's acts, statements, conduct, qualifications, fitness, "hot" debate or news, political issue, or other matter of "legitimate and substantial interest," or concern, in a congressional election merely because Petitioner is "once again" opposing Newspapers' Candidate?

5. Whether political Newspapers in exercise of its freedom and monopoly of its presses has the constitutional right, or privilege, under the New York Times Rule, to destroy all "rights secured by the constitution" to all others, including candidate, voter and right of government itself?

6. Whether political Newspapers, in exercise of its freedom and the monopoly of its presses, has the constitutional right to conceal and censor the fact that Petitioner was a candidate from February filing to only one clear day before 1968 General Election, and then by overt acts of omission and commission, obliterate and delete, in reproduction of its "official" sample ballot, name and column of Independent Candidate for Congress, representing thereby in its "Election Edition" that Petitioner was not on the General Election ballot; that Petitioner lied, when he represented that he was duly qualified and on the ballot; that, as a liar, Petitioner was an unworthy candidate – unworthy of vote, support, confidence and association; and election, by supporter, voter and public; and to further state in its explanation and excuse for omitting him from the ballot, and to establish its claim of privilege, that Dunn was such a weak, worthless and insignificant candidate that he received "only one write in vote" – his own – in the whole congressional district in some remote election year, not material to issue, privilege, or legitimate concern of substantial interest, except to prove absence of privilege, and existence of "actual malice" in Newspapers' conduct and first party original composition and publication of false ballots, election reports and statements of fact, of and concerning Petitioner, "made with actual knowledge that it was false or with reckless disregard of whether false or not," to injure Petitioner and government in vote, election and constitutional rights, merely,

because "Laurel N. Dunn ... once again is opposing Congressman W. R. Poage"?

7. Whether denial of redress, damages and/or trial by jury on merits and fact issues, resulting from wrongful interference with vote, election, reputation and constitutional right of duly qualified Independent Candidate for congress by publication of false ballots, "write-in vote," and statement of facts made thereon, with "actual malice," as defined by New York Times rule, becomes "state action," when Texas Courts render summary judgment, on defendant's motion, in favor of the most powerful, political, and monopolistic partisan Newspapers in Central Texas, ignoring constitutional questions, rights, and fact issues, including "actual malice", motive and intent, and truth, in violation of Petitioner's "rights secured by the constitution," particularly, Jury Trial; Constitutional Election, Equal Protection, Due Procedure and Process of Laws, under Seventh and Fourteenth Amendments, and Art. I, U.S. Constitution?

Statutes involved: 28 U.S.C., Sec. 1257 (3) and Sec. 2106; 42 U.S.C., 1938. Rule 19 See Appendix D for Text.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I of the Constitution of the United States reads in part as follows:

Sect. I: All legislative powers herein granted shall vest in a congress of the United States.

Sec. II: (1) The House of Representatives shall be composed of members chosen every two years by the people of the several states . . .

Sec. IV: (1) The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof.

FIRST AMENDMENT

Congress shall make, no law respecting the freedom of speech or of the press or of the people . . . to petition the government for a redress of grievances.

FOURTH AMENDMENT

The right of the people to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated.

FIFTH AMENDMENT

No person shall be deprived of life, liberty or property, without due process of law.

SEVENTH AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law.

EIGHTH AMENDMENT

nor cruel and unusual punishment be inflicted.

NINTH AMENDMENT

The enumeration, in the constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT

*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

This is an application for Writ of Certoriari for review of summary judgment proceedings in Texas courts in favor of Respondent in action for damages for wrongful interference with political, civil and constitutional rights in an election provided for and protected by Article I, U.S. Const., by publication of false ballots, write-in vote, and statement of facts made therein, "with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether false or not," (New York Times Co. v Sullivan, 84 S. Ct. 710, 726), to injure Petitioner thereby, in vote, election, reputation and constitutional rights, with impunity to partisan Newspapers, Inc., and without recourse or redress to Independent Candidate for Congress in Texas Courts.

Petitioner was in the exercise of his "inalienable" constitutional rights of speech, press, protest, participation and petition for votes and office, with his name on the 1968 General Election ballot.

Respondent interfered with and infringed upon these constitutional rights, privileges and immunities by overt acts of commission, omission, concealment, censorship and conduct by original first party creation, composition and publication of such falsehoods of and concerning Petitioner.

Newspapers, Inc., "Voice of the Central Texas Empire," (Waco-Times Herald masthead), with its equally frank by-line on the Austin American: "Read by the Decision Makers of Texas," is the leading metropolitan, and only two paper daily in Waco and Austin: 11th and 10th Congressional Districts respectively, and in Central Texas, of which elected Texas officials, including elective judiciary, are quite aware, and may take judicial notice of the monopoly and power of its political support and presses, which are, also, located in East and Southeast Texas.

Self-proclaimed "Decision-Makers of Texas," was the aggressor and Constitutional Candidate seeking election, office, and orderly charge in Congress; constitutionally was the natural and intended victim of such "actual malice," that Respondent in the excesses of its freedom and monopoly of its presses and patronage, did not hesitate to interfere with congressional election and constitutional rights, to injure Petitioner, personally and politically, to achieve its political purposes of making the Decisions of Texas, in Waco, Austin and Washington, D.C., by the reelection of its Paper Candidate of some seventeen terms in the Congress, in the maintenance and perpetuation of its Power, Prestige, and Empire – political, economic and social – as an object lesson to Petitioner, and all others, not to "again" oppose its candidate, without the advice, consent or approval of Newspapers, Inc., and to never underestimate the power of a truly political press.

With master composure and composition, planning-ahead and strategic timing, Newspapers, Inc., as "The Decision-Makers of Texas," in its much heralded "Election Edition," Sunday, Nov. 3, 1968, with no opportunity for effective reply, switched from private censorship of Dunn's candidacy to open interference with his constitutional rights, election and reputation.

Newspapers "published" not one but two false ballots, with false statements of fact in explanation thereof, with "actual malice," which, of course, "defendant was under no duty whatsoever to publish . . . as a service to the voters and candidates in the district," (Par. II, Dft's Ans., Tr., p. 14), but did publish – with name, column and office of Dunn obliterated and deleted therefrom, which certainly was not "a fair, true, correct and impartial representation of the sample ballot," or "a true copy." (Par. III, Ans., Tr., p. 14), as complained in Petitioner's Amended Petition, Tr., pp. 3-13).

Newspapers' two rigged ballots: unreadable and readable, were not published to convey truth, conserve space, or demonstrate integrity of publisher, but were to give double exposure and emphasis to "Decision-Makers" false statements and representations that Dunn was not a duly qualified candidate for congress, and on the ballot, as represented by him; therefore, Dunn was a liar and unworthy candidate as well as a worthless "one vote" candidate, to injure Petitioner in vote, election, reputation and constitutional rights by its overt acts of omission and commission; published falsehoods and "actual malice;" exhibited thereby, because "Laurel N. Dunn . . . once again is opposing Congressman W. R. Poage."

Obvious intent and "actual malice" is, in effect, admitted by Newspapers in its remarkable explanation of that blur, dark blot, or "thing" that appeared to mar its Election Edition, and reveal its journalistic reputation and purpose. (Tr., p. 20, attached): "This is the physical appearance of the Nov. 5 General Election ballot as the voter will see it *when he goes to the polls. It is not intended for the voter to read the small print* in the above photo, but *this is just to show how the ballot will look. The contents* of the ballot *are printed in large enough type for the voter to read*, at the left, on this page *so the voter can study the various listings and decide who he wants to vote for* (or against) *before the trip to the polls*. The ballot measures about 12 inches by 20 inches, one of the largest in size in several years." (Ballot published measures 5" x 8½" -- reduced to less than half size to make Dunn's Name and Office unreadable thereon, as "intended.") (Emphasis added).

Respondent offered trial court two affidavits (Tr., pp. 19, 21); neither was sufficient, in law or fact, to support its alleged privilege. (Par. IV-V, Answer, Tr., pp. 14-15); publication, (attached to Tr., p. 20); motion for summary judgment, (Tr., p. 30); and judgment entered (Tr., p. 31), and affirmed thereon (446 S.W. 2d 101, n.r.e.); of its burden of proof, assumed and required, under Rule 166-A, and the authorities thereon, "that no genuine issue of any material fact exists."

(1) Very vague, uncertain and indefinite affidavit (Tr., p. 19) of Respondent's Editor-in-Chief, a most impressive expert and interested witness, with the most to lose, his job, in event of adverse decision, is fatally defective, self serving and adds nothing to pleadings, evidence or validity of unsupported motion and judgment, as it is based on hearsay, information and belief, and a repetition of pleadings and conclusions of law prepared by and already in counsel's unverified answer and motion, neither of which is self-supporting, nor can either support the other, or judgment entered and affirmed thereon, but can only raise fact issues under the pleadings for constitutional jury trial in ordinary and due procedure, as required by Seventh and Fourteenth Amendments.

(2) Objected-to affidavit of Clerk of McLennan County on its face is limited to recorded vote of that county only. It in no way relates to the unrecorded vote cast in that county; or the vote cast, or recorded, in the then other six counties of the district, before apportionment, as charged in the false publication (Exhibit, attached, p. 20, Tr.) "that Dunn received only one write in vote" – his own -- in the whole 11th Congressional District of Texas in a prior election year, to establish excuse and privilege and to make its libel more interesting, readable, effective and damaging.

FEDERAL QUESTIONS RAISED IN STATE COURTS

Right to jury trial, application of New York rule to fact situation, and Newspapers interference with Candidate's Constitutional Rights and Art. 1 Election by published falsehoods were issues presented in Motion for Summary Judgment and in argument in District Court, and upon granting of judgment for Respondent these same Constitutional Questions were presented in detail thereafter in all Briefs, Applications and Motions filed in all of the Appellate State Courts below, and in this Petition for Writ of Certiorari.

FEDERAL QUESTIONS were raised in PETITION:

Petitioner alleged in his Petition (Tr. pp:, 3-13) that he was a duly qualified "candidate for Congress in the Nov. 5, 1968, General Election, under the Election Laws of The State of Texas and the Laws of the United States ***" Par II; that Newspapers printed false ballots write-in vote and statements of fact interfering with such election; and that Newspapers false publications and statements were intentionally, maliciously and recklessly, published, with actual malice, in utter disregard of the truth to injure candidate thereby in vote, election, reputation and constitutional right; to-wit:

*** Defendant either willfully, or by design, and with malice aforethought against this Plaintiff, sought in all manner of ways and by devious means to deliberately, maliciously, fradulently and libelously injure, damage and destroy Plaintiff, as an individual and as a candidate, personally, politically, socially, economically and financially in the most scandalous, ingenious and diabolic manner and means, employing numerous devices, designs and tricks, as if desperate to destroy Plaintiff, as an object lesson to Plaintiff, and all others, not to oppose Defendant's power programs, policies and projects, and for no one to aspire to or run for public office without first obtaining the advice, consent and leave of Defendant. (Par. V, p. 3; Amended Petition)

That the explanation of the deletion itself, if any, when found, was false, malicious and libelous, and calculated to cause Plaintiff the loss of aditional votes, from those who might chance to read it, in that the libelous explanation stated, as the reason for not publishing Plaintiff's name with the rest of the candidates as "a service to the voters and candidates in this district", to quote Par. II of Defendant's Original Answer, was that Plaintiff was "once again opposing Congressman W. R. Poage," and in a prior election, some years before, "that Dunn had received only one write-in vote."

This statement furnishes grounds for an action of libel upon proof that such matter has ceased to be of public concern and that same was published by Defendant. Plaintiff is thereby given a statutory action for libel against Defendant, Art. 5432, Vernon Ann. Tex. Stat., in addition to the other grounds for damage and wrongdoing that Defendant has provided Plaintiff herein by reason of Defendant's willful and malicious behavior and conduct, its odious and false publications and the capricious and reprehensive acts. (Par. XII, p. 7)

Plaintiff would further show that the acts of omission and commission, the deliberate, fraudulent, malicious and libelous publications and the capricious and malicious motives of Defendant are further evidence of the scope and design of Defendant's malice, purpose and desire to damage, injure and destroy Plaintiff for Defendant's own personal, private and political purposes to the extent that it would interfere with a federal election, a congressional candidate and the constitutional rights of Plaintiff, and that it would practice fraud and deception against the public, the reader, the voter and this Plaintiff and openly discriminate between candidates and persons whose names are written in in an election to prejudice the election against Plaintiff and to prevent Plaintiff from winning, or of giving him the opportunity to win, or of even a fair election. (Par. XIII, Pet. p. 7.)

Plaintiff was entitled by law to a fair, honest and impartial election and treatment by Defendant, as a personal and constitutional right, and as a result thereof the due process of government and the constitution suffer.

The rights of Plaintiff violated herein are not ordinary rights. These rights are inalienable, fundamental, constitutional rights guaranteed by the constitution and Bill of Rights and of great concern to Plaintiff. (Par. XVIII, p. 10.)

By reason of Defendant's intentional, deliberate and malicious acts of omission and commission, misrepresentations

and infringements upon Plaintiff's constitutional rights as herein complained, with intent to damage and injure Plaintiff. (Par. XIX, p. 10.)

FEDERAL QUESTIONS in COURT OF CIVIL APPEALS:

The First Seven Points of Error in Court of Civil Appeals related to summary judgment denial of jury trial in both Appellant's Brief and Motion for Rehearing and to Eighth Point of Error, as follows:

The trial court erred in granting summary judgment because Appellant states a good, meritorious and sufficient tort action herein involving fraud, deceit, misrepresentation and libel and subjective issues of the mind, such as intent, motive and actual malice, among many other jury questions of fact, including credibility of interested Affiants and the right to cross-examine hostile witnesses before a jury in cases of this nature under the Texas Statutes and Decisions and the recent "Requirements" of the "Constitutional Rules of New York Times Co. v Sullivan; Garrison v State of Louisiana; and Curtis Publishing Co. v Butts raised by the Supreme Court of the United States, the Seventh Amendment requiring trial before jury of all material fact issues involved in this case on its merits, including Civil Rights of Candidate and Voter, equal protection of, and due process under the law.

Appellant's Brief and Motion for Rehearing, pp., 1-10.

The Constitutional Questions and Rights herein involved were briefed and urged upon the District Court, Court of Civil Appeals and Supreme Court of Texas, but to no avail, hence this Application for Writ to Review Petitioner's Constitutional Rights in Texas Courts.

FEDERAL QUESTIONS in TEXAS SUPREME COURT:

Application for Writ of Error -

As stated above, Newspapers by deleting Petitioner's name from "the ballot," and representing it as true and correct, thereby represented and intentionally implied and published, as a statement of fact, that Dunn lied when he represented to supporter, voter and the public that he was a duly qualified candidate for congress with his name "on the ballot," for here was "the published ballot," and the name of Dunn was no where to be found on it, therefore, Dunn not only lied but he was a liar, as well as a weak and insignificant candidate for congress, and, being a liar, he was an unworthy candidate, unworthy of vote, support, confidence, trust or association, and said publication, false ballots and false statements of fact "tending to injure the reputation of "Petitioner," and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virture, or reputation of" Petitioner give a statutory libel action herein under Article 5430, as well as, under Curtis Pub. Co. v Butts, supra, by reason of Newspapers' published falsehoods made with "actual malice" under both state and United States authority cited. (pp. 12-13, Application for Writ of Error)

Constitutional involvement herein should not be ignored. Petitioner has the constitutional right, as candidate for congress, to a fair, honest and impartial constitutional election, "without restriction or limitation," by, or from, individuals, states or Newspapers' malicious and wrongful interference in a General Election, provided for and protected by Article I, Secs. 2 & 4, of the U.S. Constitution, and, as a matter of law and fact, "this right of participation" and "to choose," "whether for the successful candidate or not, "is protected just as is the right to vote at the election." U.S. v Classic, 313 U.S. 299, 314, 315, 318, 61 S. Ct. 1039; Ex parte Yarbrough, 110 U.S. 663, 3 S. Ct. 158; Logan v U.S., 144 U.S. 263, 12 S. Ct. 617; Lackey v U.S. 107 F. 114, 117; Felix v U.S. 186 F. 685, 689; Case of Neagle, 135 U.S. 1, 10 Sup. Ct. Rep. 658; U.S. Waddell, 112 U.S. 80, 5 S. Ct. 35; U.S. v Mosley, 238 U.S. 383, 35 S. Ct. 904; Ex parte Morrell 35 F. 261, 268. Page 15, Application for Writ of Error, Texas Supreme Court.

In Motion For Rehearing of Application For Writ of Error, No. 3: (First Par.) p. 1. NOW COMES Laurel N. Dunn, Petitioner, and files this his Motion for Rehearing of his Application of Writ of Error for reversal of judgment and remand of cause of action against Respondent to the District Court for trial on its merits by jury, as required by law, Rule 166-A, Texas Rules of Civil Procedure, Texas Libel Laws (Article 5430-5433), Constitution of the United States, the decisions of this State and of the United States.

Quite frankly, Petitioner is unable to know, or to determine, from the decision of this Court, without written opinion, just what is actually necessary to "maintain" a recoverable action, or even what his rights are, if any, procedurally and substantively, under Rule 166-A, T.R.C.P., and the Constitution of the United States on the issues of fact raised herein requiring Constitutional Jury Trial in a tort action against the "mutually local" newspaper of Waco and Austin "involving fraud, deceit, misrepresentation and libel," including wrongful and malicious interference with Petitioner's individual, civil and constitutional rights in an election "provided for and protected" by Article I, Sec. 2 and 4 of the U.S. Constitution, without the enactment of any congressional legislation thereon. Ex parte Yarbrough, 110 U.S. 651, 4 S. Ct. 152; U.S. v Classic, 313 U.S. 299, 61 S. Ct. 1031; Nixon v Herndon, (Texas Election Laws, 1927), 273 U.S. 536; 47 S. Ct. 446.

Issues of fact for jury trial on the merits are shown, and are, in fact, admitted to exist herein by the Court of Civil Appeals, page 3 of its opinion, under Rule 166-A, Texas Rules of Civil Procedure, and authorities thereon; yet, the effect of the opinions of the Courts of Texas, herein, is to deny to Your Petitioner his day in court and trial by jury of his individual, political, civil and constitutional rights, including his rights under the First, Seventh and Fourteenth Amendments, and Article I, Sec. 2 and 4 of the U.S. Constitution itself; and to hold that Newspapers, Inc., has the right to "lie," "libel," and "interfere" with Dunn's Constitutional Rights and Election ***

The next 24 pages of said motion is a duplication of the authority State and United States contained in Petitioner's application in support of Reasons for Granting Writ of Certiorari. However, at page 20: If the New York Times Rule is the correct and admitted rule of libel actions, that it is, and was followed by this Court in El Paso Times, Inc. v Trexler, supra, "in the light of these U.S. Supreme Court opinions," and Dunn followed the same authority "and its progeny," in his brief. Petitioner is unable to understand why the correct rule is not applied to Dunn v Newspapers, Inc., CCA; 446 S.W. 2d 101, instead of the rule rejected in Christy v Stauffer Pub., Inc., Texas 1969, 437 S. W. 2d 814: (7) Privilege in Texas does not extend to false statement of fact or comment.

In brief, Newspapers' libel of Dunn is the cold "calculated falsehood," or "knowingly false" publication together with the reckless disregard for the truth found in Curtis Pub. Co. v Butts, supra, in which the Supreme Court permitted Wally Butts, the coach, to recover $460,000 of his $3,060,000 awarded in the U.S. District Court for the Northern District of Georgia.

In concluding his opinion, Mr. Chief Justice Warren stated, at page 1999, 87 S. Ct.: "I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in New York Times and Garrison. Freedom of the press under the First Amendment does not include absolute license to destroy lives and careers." At page 26.

It is respectfully submitted that life and career is no more sweet to a football coach than to a candidate for Congress under the Constitution and under the First Amendment.

As provided under Ruel 23 (f), Supreme Court Rules, where record referred to is voluminous and consists only of applicable Federal Questions, as here, they shall be included in an appendix to the petition, which may, if more convenient, be separately presented. See Appendix, consisting of transcrips from courts below, for further specifications.

REASONS FOR GRANTING WRIT

Fact issues were presented and exist for submission to constitutional jury trial, in ordinary and due procedure, precluding summary judgment on issues of truth, privilege, "actual malice," motive, intent, and interest of witnesses, particularly, upon Respondent's failure to sustain its required burden of proof under Rule 166-A, T.R.C.P., on which recovery is allowed by decisions of this Court for interference with constitutional election and vote, election, reputation, and constitutional rights of Petitioner and of Government itself.

"No effective political remedy to obtain relief . . . appears to have been available . .", Mr. Chief Justice Warren, Reynolds v Sims, 84 S. Ct. 1362, 1377; or for that matter, judicial remedy in the Texas Courts. Nixon v Herndon, Tex. 1927, 47 S. Ct. 446; Nixon v Condon, Tex. 1932, 52 S. Ct. 484; Smith v Allwright, Tex. 1943, 64 S. Ct. 757; Dunn v Newspapers, Inc., Tex. 1970, 446 S.W. 2d 101, (n.r.e.), herein. . . "Undeniably the Constitution of the United States protects the right of all . . . . in state as well as in federal election." Reynolds v Sims, supra; Art. I, U.S. Const.; Ex parte Yarbrough, 4 S. Ct. Rep. 154; Swafford v Templeton, 22 S. Ct. 785; U.S. v Classic, 61 S. Ct. 1031; Terry v Adams, 73 S. Ct. 809.

In Donovan v Dallas, 84 S. Ct. 408, Mr. Justice Black held that the State of Texas could not prevent litigants from resorting to federal relief . . . particularly, where constitutional issues require review by the Supreme Court.

"Although this is a civil lawsuit between private parties, the * * * Courts (whether Alabama or Texas) have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only. . . The test is not the form in which state power has been applied but, whatever the form, whether such

power has in fact been exercised. See Ex parte Virginia, 100 U.S. 339, 346-347; American Federation of Labor v Swing, 61 S. Ct. 568." New York Times Co. v Sullivan, 84 S. Ct. 710, 718.

Society has a pervasive and strong interest in preventing and redressing attack upon reputation. Persons injured by newspapers . . . should not be relegated to remedies that make collection of their claims difficult or impossible. Curtis Pub. Co. v Butts, 87 S. Ct. 1975, 1987, (Syl. 11, 12); Rosenblett v Baer, 86 Sct 669, 679-682; Garrison v La. 85 S. Ct. 209; Goldwater v Ginzburg, 414 F. 2d 324, Cert. Den.; 90 Sct. 701.

"** the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to governmental action questioned or challenged" -- whether by State, Legislature or Court. Reynolds v Sims, supra, 1383, or "legal action." Ross v Bernard, 90 S. Ct. 741; Ex parte Yarbrough, supra; U.S. v Classic, supra.

"In Wesberry (84 S. Ct. 526) *** the Constitution *** prescribes that members of the Federal House of Representatives are to be chosen "by the People," not by Newspapers, Inc., and the failure of the State courts to protect that right is a denial of Equal Protection under the Fourteenth Amendment. Whether there has been any discrimination *** is in issue. Reynolds v Sims, supra; Exparte Yarbrough, supra; U.S. v Classic, supra; Powell v McCormack, 89 S. Ct. 1944.

"The political franchise" is "a fundamental political right" *** preservative of all rights," Yick Wo v Hopkins, 6 S. Ct., 1065, 1071; Reynolds v Sims, supra, 1381.

"Legislators are elected by voters, not farmers or cities or economic interest (political parties or monopolistic newspapers. Terry v Adams, 73 S. Ct. 809. As long as ours is a representative government, and our legislators are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired

fashion is a bed rock of our politica' tem." Reynolds v Sims, supra, 1382.

"*** representative government is in essence self government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes ***", without willful misrepresentation by Newspapers, which gives both the vocal minority and corporate power control of our elctions. Reynolds v Sims, supra, at 1383; Garrison v La., 85 S. Ct. 209, 215-216. It is the right to participate that is protected by Art. 1, Sec. 2 and 4, U.S. Const. Ex parte Yarbrough, 3 S. Ct. Rep. 152; U.S. v Classic, 61 S. Ct. 1031, 1089, 1042.

Even "the House (of Representatives) is without power to exclude any member elect who meets the constitutional requirements for membership." Powell v McCormack, 89 S. Ct. 1944, 1977, a power that Newspapers, Inc., sought to exercise by excluding Petitioner from its published ballots.

Equal Protection Clause guarantees the opportunity for equal participation to all, whether because of race or political party, Brown v Bd. of Education, 74 S. Ct. 686; Terry v Adams, 73 S. Ct. 809; or economic status, Griffin v Illinois, 76 S. Ct. 851; Reynolds v Sims, supra, at 1384; Swafford v Templeton, supra. "This is the clear and strong command of our constitution's Equal Protection Clause. This is the essential part of a government of laws and not men. . ." Reynolds v Sims, supra, at 1384-1385, and not of Newspapers.

Newspapers, Inc., and Texas courts denied and ignored Petitioner's "rights secured by the Constitution:" New York Times Co. v Sullivan, 84 S. Ct. 710; and such rights that he may have under Rule 166-A, T.R.C.P., and Texas Libel Laws, Art. 5430-5433a.

"For it is the constitutional right, regardless of the method

of interference (that is protected) from injury and oppression." U.S. v Classic, 61 S. Ct. 1031, 1042; whether by "sophisticated muckraking," Curtis v Butts, supra, p. 1993, or "simple minded modes of discrimination," Reynolds v Sims, 84 S. Ct. 1362, 1383.

FIRST QUESTION Presents: Numerous Fact Questions for Trial by Constitutional Jury:

(A) By the very nature of a libel action, pleadings and answer, fact issues of truth, privilege, actual malice, motive, and intent, and interest of witnesses, are raised for proper jury determination, precluding summary judgment, Giblet v Houston Post Co. 310 S.W. 2d 388 (n.r.e.); Belli v Orlando Daily Newspapers, Inc., 389 F. 2d 579, Cert. Den., 89 S. Ct. 88; Christy v Stauffer Pub. Inc., Tex., 431 S.W. 2d 54; Pape v Time, Inc., 354 F. 2d 558, Cert. Den., 86 S. Ct. 1339; De Savitsch v Patterson, 159 F. 2d 15; Goldwater v Ginzburg, 414 F. 2d 324, Cert. Den., 90 S. Ct. 701.

In fact, 20 A.L.R. 2d., at 1012 states: Issue of "actual malice" was held to present a question of fact precluding disposition by summary judgment in Pape v Time, Inc. (1965, C.A., 7th, Ill.) 354 F. 2d 558, Cert. Den., 384 U.S. 909, 16 L. Ed. 2d 361, 86 S. Ct. 1339. (Pape like Dunn involved the deliberate rewording of "report" to make it more readable and interesting, and appropriate to, and for publisher's purpose, resulting in liability therefor).

See New York Times rule, 84 S. Ct., at 726, where the defense of privilege is based upon issue of "actual malice," as there defined, a fact issue for jury determination.

Also, the fact Defendant in its Answer, Par. IV, Tr., pp. 14-15, admitted no criticism of "plaintiff's official conduct." (Discussed in Questions Three and Four.)

(B) Even upon Defendant's failure to sustain its burden of

proof. Petitioner still has his cause of action for jury trial thereon. Rosenblatt v. Baer, 86 S. Ct. 669; Time, Inc. v Hill, 87 S. Ct. 534; Goldwater v Ginzburg, 414 F. 2d 324; Pape v Time, Inc., 354 F. 2d 558, Cert. Den., 86 S. Ct. 1339; De Savitsch v Patterson, 159 F, 2d 15; Curtis Pub. Co. v Vaughn, 278 F. 2d 23; Fitzjarrald v Panhandle Pub. Co., Tex., 228 S.W. 2d 499; Curtis v Butts, 87 S. Ct. 1975.

(C) Under Rule 166-A, T.R.C.P., burden of proof that no genuine issue of any material fact exists is upon movant in its motion for summary judgment, and all doubts are resolved against Respondent, herein; (McDonald Tex. Civ. Practice, V. 4, 1392, Sec. 17.26 VI; Garner v Martin, Tex. 345 S.W. 2d 274; and Petitioner is "entitled to the benefit of every reasonable inference which can be drawn in his favor." Womack v Allstate Ins. Co., Tex., 296 S.W. 2d 233, 235. See Gulbenkian v Penn, Tex., 252 S.W. 2d 929.

Respondent failed to sustain its burden of proof.

(D) "*** to authorize rendition of summary judgment, based on supporting affidavits, the affidavits must contain statements of fact which the affiant knows and is to substantiate on a trial of the case." Box v Bates, supra, at 319.

Obviously, "the first and only issue necessary to be here decided is the sufficiency of the affidavits . . . supporting . . . motion for summary judgment." Murfee v Oquin, CCA, 423 S.W. 2d 172, Ref. N.R.E. (In fact, form and content of affidavits, contentions of parties, and first point of error were identical herein, and therein, where the Court reversed judgment below and remanded case for jury trial on its merits, as Petitioner insists should be done herein.) Weaver v Brandin, CCA, 394 S.W. 2d 709, writ dism d; Tobin v Garcia, supra.

"Affidavit . . . is fatally defective . . . it does not allege that it was made on personal knowledge . . . nor does it show affirmatively . . . affiant is competent to testify as to the matters in the affidavit, both of which are required by Rule

166-a (e). . . . And (said) motion is based on conclusion of law. Box v Bates, (supra)." Murfee v Oquin, supra. An unsupported general statement is affiant's "conclusion" and "the ultimate issue to be decided by the trier of fact upon retrial. Gaines v Hammon, Tex., 358 S.W. 2d 557, 563.

(E) Although Defendant failed to sustain its required burden of proof under Rule 166-A, and Plaintiff was not required to reply thereto, Box v Bates, 346 S.W. 2d at 319, Petitioner filed voter counter-affidavits and certificate of Bell County showing publication false, in fact, and that affidavits in support of publication and motion were inapplicable; the filing was acknowledged by the 10th Court in its opinion, p. 102, 446 S.W. 2d: "Defendant attached affidavit of the Clerk of McLennan County which stated that in the 1964 election Laurel N. Dunn received only 1 write in vote for Congress in McLennan County. Plaintiff replied to defendent's motion for Summary Judgment, and attached affidavits reflecting that 3 persons voted for him for Congress in McLennan County in the 1964 election, and that he received 20 votes in Bell County in such election." Note: publication did not limit alleged write-in vote to McLennan County, as did the Clerk's affidavit; also, Dunn shows votes in other counties ignored by Respondent's affidavits, therefore, variation in published charge and affidavits in support thereof, raise issues of fact for jury determination which were ignored by Texas Court of Civil Appeals in holding the fase statement of fact was "substantially true," when it was in fact false, as alledged by Dunn, and, so held by the courts of Texas and the United States. Gibler v Houston Post Co. supra; Bell Pub. Co. v Garrett Engr. Co., Tex. Com. App., 170 S.W. 2d 197; Belo & Co. v Looney, Tex., 246 S.W. 777; Curtis Pub. Co. v Butts, 87 S. Ct. 1975, at 1982.

Of only two cases cited, Fitzjarrald v Panhandle Pub. Co., Tex., 228 S.W. 2d 499, was the only one in point, and it was contrary to the 10th Court's opinion, as the Tex. Sup. Ct. recognized and declared the right of jury trial, and the right to defend reputation in a libel action in Texas, both of which

rights were denied to Dunn, herein. Fitzjarrald involved the conduct of a district attorney, the Texas rule was declared therein to be: "All statements that are privileged should be submitted to the jury for them to determine whether . . . published with malice, and all statements libelous per se should be submitted to the jury for them to determine . . . whether true or false," and the finding "without actual malice" was reversed and remanded for retrial on proper instructions to the jury.

The other case, Walker v Globe-News, CCA, 395 S.W. 2d 686, is obviously applicable only to its own fact situation, which did not apply, and was not an issue in Dunn. Express Pub. Co. v Keeran, Tex. Com App., 284 S.W. 913. Undoubtedly, the Court failed to distinguish between an "account" which need not be "literally true," Ray v Times Pub. Co., Tex. Com. App., 12 S.W. 2d 165, 166, and "the statement of fact" – "that Dunn received only one write in vote." Belo & Co., v Looney, Tex., 246 S.W. 777. This case and distinction was repeatedly cited by Petitioner in Appellate Brief: (a) Court of Civil Appeals, p. 41, "The privilege does not extend to the making of a false statement of fact," Belo v Looney, supra, see also pp. 58-59. (b) See also, pp. 17, 18, 19, Exhibit No. 1, Application for Writ of Error to Texas Supreme Court, at p. 19: "It is settled in Texas that a false statement of fact concerning a public officer, even if made in a discussion of matters of public concern, (which one vote was not, under Art. 5432 (5), is not privileged as fair comment, under Art. 5432(4). Citations included Belo v Looney, supra, and concluded: "and being false, neither statement of vote nor publication of false ballot, can be "substantially true." Gibler v Houston Post Co., CCA, 310 S.W. 2d 388. "*** the only defense raised by *** Curtis was one of substantial truth. No constitutional defenses were interposed ***." Curtis v Butts, 87 S. Ct., at 1982. Error arises in "mistating" rather than in commenting, De Savitsch v Patterson, 159 F. 2d., at 16.

Obviously, Affiants, Respondent and Texas Courts did not sustain their required burden of proof, motion or summary judgments entered and affirmed thereto.

Deficiency of its publication, answer, affidavits, motion, judgment, and Court's opinion were recognized in Respondent's Counterpoint No. 2 of its Reply to Application for Writ of Error wherein Texas Sup. Ct. was requested to imply that "The Court of Civil Appeals was correct in its implied finding that there were no issues of material fact." In fact, this opinion was so vague and inappropriate to the issues in the case that it was difficult to recognize its application to Petitioner's complaint, brief and argument before the Court, or to brief an appeal based thereon.

Court of Civil Appeals AFFIRMED summary judgment in rather arbitrary justification, unsupported by authority, or reasoning: "The statutory requirement is satisfied if it be substantially true. *** We think the complained of matter not libelous as a matter of law. Plaintiff's points and contentions are overruled. AFFIRMED," which appears to justify authoritative comment:

(a) Of the effort to conveniently dispose of vexing litigation and an embarrasing legal problem by summary judgment, Mr. Justice Jackson, in Sartor v Ark Nat. Gas Co., 64 S. Ct. 724, 728-729, observed: The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear where the truth is, that no genuine issue remains for trial, and the purpose of the rule is not to cut litigants off from their right of trial by jury, if they really have issues to try. *** In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which made the summary judgment an inappropriate means to a very desirable end. (At p. 729): The rule has been stated "that if the Court admits the testimony, then it is for the jury to decide whether any, and if any, what weight is to be given to the testimony." Spring Co v Edgar, 99 U.S. 645, 658. "*** the jury, even if such testimony be uncontradicted, may exercise their independent judgment." The Conqueror, 17 S. Ct. 510, 518. "*** the mere fact that the

witness is interested in the results of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." Sonnentheil v Christian Moerlein Brewing Co., 19 S. Ct. 233, 236.

The Tex. Sup. Ct. case of Taylor v. Arlington Ind. Sch. Dist., 335 S.W. 2d 371, states the general rule on interested witnesses, and is in accord, but not followed by Texas Courts in the case of Dunn.

Significantly, in Poller v C.B.S., Inc., 82 S. Ct. 486, Mr. Justice Clark stated: "*** summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which has so long been the hallmark of 'even handed justice.'"

(b) Under "doctrine of libel per se," courts tend "to restrict responsibility unduly" resulting "in immunity from liability even though the statement is made with malice. The New York Court of Appeals which sponsored the doctrine has abandoned it," Defamation of Public Officers, 49 Columbia L. Rev 875, 901 (1949) Dix W. Noel.

Likewise, in Democracy and Defamation: Fair Game and Fair Play II, pp. 1293-1294, 42 Col. L. Rev (1942) David Riesman wrote that this doctrine, or type of opinion, presents an "effective way of avoiding trials on issues of truth and privilege" by treating it as a "question of law for the courts," by which defendant "can get judgment on demurrer." Cases that give "publications non-defamatory" status "have become the most severe judicial obstacle to self-protection by officials, and conversely the most clear carte blanche to vilifiers."

Where no privilege is established, it does not mean no libel,

but rather that the official, candidate or "public figure," is libeled, as an individual, that the issue of privilege does not exist, and that an action may be had be for a jury in tort, as at common law. Cranfill v Hayden, Tex. 80 S.W. 609; Bell Pub. Co., Com. App., 170 S.W. 2d 197; Fitzjarrald v Panhandle Pub. Co., supra, 503; Rosenblatt v Baer, 86 S. Ct. 669; Ross Bernard 90 S. Ct. 733, 735, 741; Pape v Time, Inc., supra; Goldwater v Ginzburg, supra; Belli v Newspapers, supra.

SECOND QUESTION asks whether jury trial is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." (Powell v Alabama, 53 S. Ct. 55); "basic in our system of jurisprudence." (In re Oliver, 68 S. Ct. 499); and whether it is a fundamental right, essential to a fair trial, (Gideon v Wainwright, 83 S. Ct. 792; Malloy v Hogan, 84 S. Ct. 1489; Pointer v Texas, 85 S. Ct. 1065)." This claim of "the right to trial by jury guaranteed by the Sixth Amendment" was before this Court in Duncan v Louisiana, 88 S. Ct. 1444, and was held to meet "these tests." It is, again, before the Supreme Court herein. This time under the Seventh Amendment involving Petitioner's right to jury trial in a libel action recognized at common law, Ross v Bernard, supra; Curtis v Butts, supra; other tort actions, Rosenblatt v Baer, supra; and under Art. I., U.S. Const., U.S. v Classic; Reynolds v Sims, supra.

Presented herewith is the constitutional right of Congressional candidate to civil jury trial under the Seventh Amendment in an action for libel on its merits and issues of truth, "actual malice," motive, intent, interest of witnesses, and privilege, denied to him by State Court application of state summary judgment procedure, in violation of trial guaranteed by the Seventh Amendment and of constitutional rights, including Bill of Rights and Equal Protection, Due Procedure and Process of Laws under the Fourteenth Amendment.

Constitution makes no distinction between "trial by jury" under Sixth and Seventh Amendments. Jury of peers is equally

important in both civil and criminal trial with right of due process and confrontation of witnesses. "Fourteenth Amendment denies State the power to deprive any person of life, liberty or property, without due process of law," and is applicable to the First Eight Amendments without distinction. Duncan v La., supra, at pp. 1446-1446.

"*** we hold that the Constitution was violated when appellant's demand for jury trial was refused," Id., supra, at 1448; furthermore, "its preservation and proper operation" is a protection against arbitrary power – such as exhibited by Newspapers and Texas Courts, complained herein.

"The (jury trial) clause was clearly intended to protect . . . from oppression by the Government." Singer v U.S., 85 S. Ct. 783.

"Fear of unchecked power, so typical of our State and Federal Government *in other respects*, found expression in the criminal law ***." Duncan v La., supra, at 1451. (Emphasis added.)

"No free man shall be outlawed, banished, or in any way destroyed, . . . except by the lawful judgment of his peers and the law of the land." Magna Carta, Chap. 39. (Mr. Justice Black, Duncan v La., 88 S. Ct. 1444, at 1457.)

Jury "preservation and proper operation" is "a protection against arbitrary rule." Id., supra, 1448. And "depriving us, . . . of the benefits of trial by jury" was a complaint in the Declaration of Independence. Duncan v La., 88 S. Ct. 1444, at 1449.

"The guarantees of jury trial in . . . Constitutions reflects a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted . . . to prevent oppression by government. Those who wrote our constitutions knew from history and experience that

it was necessary to protect against unfounded ... charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers ... strove to create an independent judiciary but insisted upon further protection against arbitrary action. (Jury gives) ... "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. If (the victim of circumstances, as Petitioner herein,) preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the ... judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over life and liberty of the citizen to one judge or to a group of judges. *** The deep commitment of the Nation to the right of jury trial ... against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." Id., supra, 1451. "Our conclusion is that ... a general grant of jury trial for serious offenses is a fundamental right, essential for the preservation of justice and for assuring that fair trials are provided..." Mr. Justice White speaking for the Court, Duncan v Louisiana, 88 S. Ct. 1444, at 1451-1452.

"The Seventh Amendment preserves to litigants the right to jury trial in suits at common law -- in actions for damages to person or property, for libel and slander ... All agree ..." Ross v Bernard, Feb. 1970, 90 S. Ct. 733, 735, 741.

In Simler v Conner, 83 S. Ct. 609, this Court held right to Seventh Amendment trial depended upon the nature of the issue tried, and it being a legal action, plaintiff was entitled to jury... Summary judgment was improper substitute for jury trial on the issue.

Privilege based upon fact issue of "actual malice", as defined by New York Times Rule, 84 S. Ct., at 926, raises question of fact for constitutional Seventh Amendment Jury

determination, and was so held in Pape v Time, Inc., supra, Cert. Den., 86 S. Ct. 1339, and Petitioner is entitled to jury trial thereon, herein.

As stated, in libel suits, the issue of "truth," "actual malice," motive, intent, interest of witnesses, and amount of damages, entitle Plaintiff to jury trial, Pape v Time, Inc., supra; Curtis v Butts, supra; Ginzburg v Goldwater, supra, Cert. Den., 90 S. Ct. 701; Time, Inc. v Hill, supra; Rosenblatt v Baer, supra; New York Times Co. v Sullivan, supra.

Herein, the State courts forbid a jury to "decide essentially jury questions in libel cases. I regret to see the court take a single step in the direction of holding that a judge rather than the jury is to have the determination of any fact in libel cases." Mr. Justice Black, at page 681, Rosenblatt v Baer, 86 S. Ct. 669; Curtis v Butts, 87 S. Ct. 1975, 2000, 2001.

"We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damages to that amount, capable of estimation in money." (Wiley v Sinkler, supra; Swafford v Templeton, 22 S. Ct. 783). Giles v Harris, supra, at 641.

"*** it was the plaintiff's right to prove her case and go to the jury, and the defendant (newspaper) would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view." Peck v Tribune Co., 29 S. Ct. 554; Rosenblatt v Baer, 86 S. Ct. 669, at 677-682.

THIRD and FOURTH QUESTIONS Present:

Respondent's Original Answer, Tr., pp. 14-15, Par. IV: "that the publication complained of in no way related to or questioned plaintiff's official conduct," as a declaration against interest, an admission of no privilege, and a waiver of record of any defense "relating to or questioning" Petitioner's "official conduct," which was the basis of the New York Times rule, 84

S. Ct., at 726; and, there was no "legitimate and substantial interest" involved in "only one write in vote" in a remote election, when interest in current election that incumbent had an opponent on the ballot was being concealed and censored by altered publication of ballots, with "actual malice." Curtis v Butts, 87 S. Ct., at 1997.

In fact, there was no criticism of the person or discussion of issues or government required by concurring opinions in Rosenblatt v Baer, supra, which "is the very center of the constitutionally protected area ***; therefore, "the 'public official' designation applies (only) to those . . . who have, or appear to the public to have *substantial* responsibilities for or control over the conduct of governmental affairs." Id., at 675-676; Curtis v Butts, 87 S. Ct., at 1997; Belli v Newspapers, supra, at 587, 588.

If such alleged privilege had existed, its publication, subject to proof of "actual malice," would have revealed Dunn, as a candidate, and reasons for change in Congress, which Newspapers sought to conceal and censor.

Any such timely "privileged" publication appearing in Newspapers would really have been "news," and an admission in print, rather than in pleadings, that the "Paper Candidate" had an election ballot opponent; but, also, a premature exposure of Newspapers' "grand design" of "sophisticated muckraking" and "venting of (publishers') spleen," Curtis v Butts, 87 S. Ct., at 1993, 1994, by "simple minded discrimination," Reynolds v Sims, 84 S. Ct., 1983, in interfering with an election, provided for and protected by Art. 1, Sec. 2 and 4 of the Constitution itself from individuals, States, and Newspapers, Incorporated, Ex parte Yarbrough, supra; U.S. v Classic, supra, merely because Petitioner was exercising his Constitutional right of speech and to office in "once again opposing" the Foolish Federal Farm Program "which has put more Central Texas cotton growers off the farm than the boll weevil" to create ghetto and urban problems, and an excess of filling station operators.

Other allegations in Answer, motion and affidavits for summary judgment, relating to admittedly non-existent privilege do not raise a defense thereto that does not exist.

"The fact that . . . supporting affidavit denied that the "Goldwater issue" had been published with actual malice did not require that . . . motion for summary judgment be granted . . . St Amant v Thompson, 88 S. Ct. 1323." Goldwater v Ginzburg, supra at 336.

In absence of statutory or constitutional privilege Texas Courts are unauthorized to make one to suit the occasion, as a judicial privilege or "political tool" for partisan Newspapers, Inc., to interfere in elections and to destroy political critic of its operations and manipulations in government.

"The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." A.P. v N.L.R.B., 57 S. Ct. 650, 656; Curtis v Butts, 87 S. Ct., at 1989. Newspaper has no privilege to censor, a thing that government itself is forbidden to do. A.P. v U.S.; 65 S. Ct. 1416, 1424, 1425; Red Lion Broadcasting Co., 89 S. Ct. 1405, 1806, 1808. In fact, "No conduct has such an absolute privilege as to justify all possible schemes it may be a part. Aikens v Wisc., 25 S. Ct. 3.

The record here, however (also), leaves open the possibility that petitoner (Dunn) could have adduced proofs to bring his claim outside the Rule. Moreover, even if claim is within New York Times, Dunn presents a jury question of malice as there defined. Rosenblatt v Baer, 86 S. Ct. 669; Time, Inc. v Hill, 87 S. Ct. 534, 544; Goldwater v Ginzburg, 414 f. 2d., at 328; Belli, 389 F. 2d., at 589.

"In his amended complaint Belli (as did Dunn) charged the defendants with actual malice in publication of the allegedly libelous article. This charge then, is sufficient on its face to establish a basis for a showing of actual malice by defendants in

the perpetuation of the alleged libel, as required by the New York Times decision," Belli v Orlando Daily Newspapers, Inc., 386 F. 2d., at 589, Cert. Den., 89 S. Ct. 88.

FIFTH QUESTION Presents: "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." New York Times, 84 S. Ct., at 720, and applies to candidate as well as Newspapers. Press has no monopoly on speech or constitutional right. N.B.C. v U.S., 63 S. Ct. 997; A.P. v U.S., 65 S. Ct. 1416, 1424; Red Lion Broadcasting Co. v F.C.C., 89 S. Ct., at 1806, 1807. The constitution "was fashioned to assure unfettered interchange of ideas ***." Roth v U.S., 77 S. Ct. 1304, 1308; with "the opportunity for free political discussion . . . that government may be responsive to the will of the people and that change may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle to our constitutional system." Stromberg v California, 51 S. Ct. 532, "It is a prized American privilege to speak one's mind. . .", Bridges v California, 62 S. Ct. 190, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." N.A.A.C.P. v Button, 83 S. Ct. 328.

However, because of its position and monopoly, Newspapers sought to destroy Dunn and his several constitutional rights giving in turn several causes of action thereon, including libel, whether "public figure" or not, because of "actual malice" exhibited in interfering with a general election, provided for and protected by Art. I, Sec. 2 and 4 of the Constitution itself, and in denial of his First Amendment, and other rights.

"For speech concerning public affairs is more than self expression; it is the essence of self government," Garrison v La., 85 S. Ct., at 216.

"Our touchstones," as clearly stated in Curtis v Butts, St.

S. Ct., at 1989, "are that acceptable limitations must not affect "the impartial distribution of news" and ideas. A.P. v N.L.R.B., 57 S. Ct., at 656." Actions for abuse of this right and privilege by censorship or publication of "calculated falsehoods" is not a burden but a benefit. Curtis v Butts, supra; Garrison v La., supra; Goldwater v Ginzburg, supra; Peck v Tribune Co., supra; Pape v Time, Inc., supra; Rosenblatt v Baer, supra; A.P. v U.S., supra; Red Lion Broadcasting Co. v F.C.C. "Nor" should Petitioner be denied his First Amendment Rights or deprived of other Constitutional rights, or of office, "because of what (he) chooses to think and publish," or against whom he "once again" chooses to oppose for Congress, supported by monopolistic Newspapers and Texas Courts in denial to Petitioner of these rights in what amounts to state action and absolute privilege to lie, libel and publish false ballots and "calculated falsehoods" to interfere with such rights without recourse to Petitioner and, with impunity to Paper. Curtis v Butts, supra; Goldwater v Ginzburg, supra. "Nor" should Petitioner constantly fear libel, "physical and economic retribution solely because of what he seeks to think and publish," or do, constitutionally; because of the "actual malice," interferences, and damages inflicted upon him by Newspapers, amounting to criminal conspiracy, without civil action, jury trial or due process, or even resort to Federal Grand Jury. (See, Letter, Feb. 19, 1970, U.S. District Attornty, Exhibit Attached.)

The question here is not that of New York Times where "an action brought by a public official against critics of his official conduct, abridges freedom . . . guaranteed by the First and Fourteenth Amendments." New York Times, supra, 719; This is not "an otherwise impersonal attack on governmental operations (which) cannot be utilized to establish a libel" (action). Rosenblatt v Baer, 86 S. Ct. 669, 673, 682; Thus, no "action for libel on government," herein, or criticism of public conduct, New York Times Co., 84 S. Ct., 726; Curtis v Butts, 87 S. Ct., 1980; but, a representation by false publication that Dunn was a non-candidate and a liar for representing himself as

a candidate. No basis, therefore, exists for alleged privilege, since it was used as a political tool, and as an excuse to interfere with duly qualified candidate's political, civil and constitutional rights, with "actual malice," exhibited by conduct and overt acts of omission and commission and interference with Art. I General Election. Garrison v La., 85 S Ct., at 216. "Surely, a deliberate act of omission can show malice as well as an act of Commission." Pape v Time, Inc., 419 F. 2d 980, 982.

A personal attack was specially directed at Dunn by omission of his name from the ballot, censorship of truth, discrimination between candidates, publication of false statement of facts which "abridged" Dunn's First Amendment, Rights, New York Times Co. v Sullivan, 84 S. Ct., at 720, which by State action, Id., at 718, results in denial of Equal Protection, Due Procedure and Process of Laws when his right to constitutional jury trial of constitutional issues and questions was summarily refused by Texas Courts. . . . oblivious of requirements of the Fourteenth Amendment.

Action of Newspapers and Texas Courts in denial of Petitioner's constitutional rights of speech; press, petition, participation and advocacy, and liberty and property rights is raised and extends to the full length of conduct which individual and candidate is free to pursue, unrestricted, except for proper government object. Bolling v Sharpe, 74 S. Ct. 693, 694; Aptheker v Sec. of State, 84 S. Ct. 1659, 1663, note 5; Cantwell v Conn., 60 S. Ct. 900, 903-904, with no right in the Courts to discriminate in favor of political press and against candidate seeking constitutional right to office. Curtis v Butts, 87 S Ct., at 1989.

Right of Dunn to exercise his, personal, political civil and constitutional rights is protected by Art. I, Bill of Rights and Fourteenth Amendment.

As in Gitlow v New York, 45 S. Ct. 625, question presented is whether acts of Newspapers in publishing false ballots and

acting as a "Jaybird Convention", Terry v Adams, 73 S.Ct. 809, "as construed and applied in this case by the state courts," deprived Dunn of his liberty of expression under the First; person and reputation under the Fourth; reputation, rights and property under the Fifth; protected and guaranteed jury trial under the Seventh; cruel and unusual punishment for attempting to exercise constitutional right under the Eighth; rights retained under the Constitution under the Ninth; and Equal Protection, Due Procedure and Process of Law under the Fourteenth Amendments. New York Times Co. v Sullivan, supra; Curtis v Butts, supra; Ross v Bernard, supra; Duncan v La., supra; Levy v La., 88 S.Ct. 1509; Glona v Ins. Co., 88 S.Ct. 1515; U.S. v Classic, supra; Reynolds v Sims, supra.

Right to choose, to vote freely and to participate in an election is such a right. Reynolds v Sims, 84 S.Ct. 1378; U.S. v Classic, 61 S.Ct., at 1039; Ex parte Yarbrough, supra; and it cannot be denied directly, Guinn v U.S., 35 S.Ct. 926, or indirectly, Harman v Forsenius, 85 S.Ct. 1177.

"An overriding state interest in protecting ... from malicious libels should be recognized in these circumstances ... there is no ground for concluding that ... liability for tortious conduct has been eliminated." United Constr. Wrks. v Laburnum Const., 74 S.Ct. 833. Linn v United Plant Guard Wkrs., 86 S.Ct. 657, 662; Rosenblatt v Baer, supra; Curtis v Butts, supra; Time, Inc. v Hill, 87 S.Ct. 534; Goldwater v Ginzburg, supra.

SIXTH QUESTION Presents: The reality of the fact: "At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective tool to unseat the public servant or even topple an administration." Garrison v State of Louisiana, 85 S.Ct., at 216.

"Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or

further proliferation. *** The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statement was true. The finder of fact must determine whether the publication was indeed made in good faith. Profession of good faith will be unlikely to prove persuasive ***." St. Amant v Thompson, 88 S. Ct. 1323, 1326.

Surely, Dunn's case is the one spoken of in Garrison and St. Amant, where the "political tool" and the "calculated falsehood" are the trade mark of the publisher; and where "personal knowledge" and "high degree of awareness of *** probable falsity" could not be misinterpreted, as mistaken belief or "sereious doubts" by partisan publisher or protective court.

Mr. Justice Harlan delivering the opinion in Curtis v Butts, at 1991 stated: "We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial damage to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Dunn is the fact situation of Curtis v Butts, supra, only stronger. Curtis acquired its "story" by purchase and with knowledge of threatened law suit.

No Third Party, purchase or gift of the libel was involved in Newspapers' Do It Yourself Political Project-"Brazos Bottom" style of "venting (its) spleen" in "Sophisticated Muckraking" by conducting its own "Jaybird Convention to interfere with Petitioner's election, reputation, and constitutional rights with impunity and without recourse resulting in State Action. Nixon v Herndon, supra; Terry v Adams, supra, and Reynolds v Sims, supra.

Use of the occasion, privilege, election and press, as a

political tool is not sanctioned, nor is the proliferation of the lie and "calculated falsehood", or publication of false ballots, privileged. Garrison v Louisiana, supra; U.S. v Stone, 188 F. 836.

In Dunn, as in Goldwater, there was no doubt against whom the published false ballots, write in vote, statements of fact therein, or malice were directed.

In fact, Goldwater v Ginzburg, 414 F. 2d 324, Cert. Den., 90 S. Ct. 701, is the prototype of Dunn. Goldwater and Dunn were both candidates, independent and conservative, for constitutional office, advocating adherence to the constitution and due processes thereof. Both were selected as the intended victims of personal and political attack, plotted and planned, to destroy, and ruin lives and careers, as in the cases of Curtis Pub. Co. v Butts, 87 S. Ct. 1997, 1999; herein, using privilege as the excuse and summary judgment the means, through State action.

"Summary judgment will not lie if real issue appear *** if the "privilege" is conditioned upon the truth of the reproduced report, a real issue is thereby created. The effect of summary judgment . . . is to extend to the press a license to take off from a foundation of an official report and run rough-shod over the unfortunate victim. The duty to inform the public and the right to make a "fair comment" ought not be so interpreted as to prejudice the individual's right to protect himself in the courts when he is attacked." De Savitsch v Patterson, U.S.C.A., D.C., 1946, 159 F. 2d 15.

Both Newspapers and "*** Ginzburg, added certain inuendoes to some quoted statements and quoted others out of context in order to support his (and its) predetermined result." Goldwater v Ginzburg, supra, at 337. In fact, 5th Circuit Court of Appeals continues:

"Citation of sources . . . and accurate reprinting . . . of most of the original responses . . . does not, as (Ginzburg) appear(s)

to claim, insulate (him) from responsibility for any of the false statements . . . made . . . Repetition of another's words does not release one from responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his report. St. Amant v Thompson, 88 S. Ct. 1323." Goldwater v Ginzburg, 414 F2, 324 at 337, Cert. Den. Ragano v Time, Inc., 302 F. Supp., at pp. 1009-1010: "*** Time had actual knowledge of the fact that plaintiff was an attorney yet decided to disregard or omit this fact.*** Where *** publisher chose to substitute his opinion for facts actually known to him (as seven, not just one county in 11th District) *** he has come forward with sufficient evidence to show reckless disregard."

In Pape v Time, Inc., 419 F. 2d 980, (another almost identical fact situation), before the Court for the third time, (Id., 354 F. 2d 558, Cert. Den., 86 S. Ct. 1339), Senior Circuit Judge Duffy was "concerned with Time's falsification of what the report said ***. Time omitted *** fact ***." (Just as Newspapers omitted Dunn's name from the ballot, and failed to mention that alleged "only one write-in vote" applied to only one of seven counties in 11th District). Because of Time's mistatement of the "report.": "The jury could conclude that this amounted to an 'intent to inflict harm through falsehood!'" Garrison v Louisiana, (supra, at 215); Henry v Collins, (85 S. Ct. 962)."

Judge Duffy continued: "We think pertinent the recent statement of the Court of Appeals for the Second Circuit in Goldwater v Ginzburg, 414 F. 2d 324, 337 (2 Cir. 1969): One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context. We hold the District Court was again in error in granting defendant's motion for directed verdict."

Kiley, Circuit Judge (concurring) that this case should have gone to the jury, stated that the deliberate and knowing failure

"to mention the limits of the article *** was sufficient prima facie to prove that Time published the article in suit with knowledge that it was false," (as contended by Dunn). "The publication of the article with the words in the *** report deliberately omitted could reasonably be found to be a publication of a defamatory falsehood *** with knowledge that it was false." This met the test of New York Times *** under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of that vital element of actual malice." Neither the Time article nor Newspapers' publications carried the qualifications that were urged upon the court after suit. The publications must be considered "as *** published," and not as amended by affidavit and brief. De Savitsch v Patterson, 159 F. 2d 15.

Surely Newspapers' overt acts of commission and omission and false publications, although not involving criticism of "official conduct" or legitimate and substantial interest, were sufficient to support ordinary tort action, and "an imputation of impropriety, or crime," by Petitioner, requiring jury trial on the issue. New York Times, supra; Rosenblatt v Baer, 86 S. Ct., at 673; Goldwater v Ginzburg, 414 F. 2d 324 (Cert. Den.); Belli v Orlando Daily Newspapers, Inc., 389 F. 2d 579, (Cert. Den.); Pape v Time, Inc., 354 F. 2d 558, (Cert. Den.)

The knowingly false or publication in reckless disregard of whether false or not, of only part of the write in vote in one county in the district, represented as seven in publication, and only one in affidavit in support thereof, in a remote and forgotten election year, after time for contest had expired and voting records had been destroyed, as provided by law, denotes actual malice, as above defined, sufficient to support an action under Article 5432 (5), Vern. Ann. Tex. St.; New York Times rule and its progney above cited.

Furthermore, actual malice of Newspapers and its monopoly is demonstrated by the further fact in the exercise of "its" privilege and alleged right, Newspapers concealed,

censored and interfered with candidate's election and constitutional rights by its false publications, and then denied the opportunity of reply by the timing of its publication, and insited upon, and cited authority in its Reply to Plaintiff's Petition to Court of Civil Appeals of its right to refuse Candidate's political advertisement; and/or subject it to censorship at enhanced rates.

Newspapers support of Paper Candidate has been so complete that voters thought Dunn's name on the voted ballot was a typographical error.

Reader is not required to read the whole Sunday Edition to determine whether or not publisher is telling the truth, or to look for "hide and seek" exceptions to the published "ballot," represented as true.

"But since the article on its face is also capable of carrying defamatory meaning, it is for the jury to decide whether the words were in fact so understood." Belli v Orlando Daily Newspapers, Inc., 389 F. 2d, at 584.

"The law does not strip words of their minimum meaning and ignore their implications . . ." Gariepy v Pearson, 207 F. 2d 15, 26, cert. den., 74 S. Ct. 241; Washington Post v Chaloner, 39 S. Ct. 448.

"Whether defendant magazine publisher knowingly published defamatory statements about plaintiff presidential candidate and was motivated by actual malice was a jury question in libel case. (As in Dunn).

"The answer denied that any statements contained in the magazine were false or defamatory and denied that the magazine and statements were published and circulated with actual malice. Moreover, the defendant pleaded the affirmative defense of truth, of fair comment, and of privilege based upon the fact that the plaintiff was a United States Senator and

candidate for the Presidency at the time the magazine was published and that the alleged fact was published without actual malice." The defendant's motion for summary judgment was denied. Goldwater v Ginzburg, 414 F2 324. In accord, Pape v Time, Inc., 419 F. 2d 980; De Savitsch v Patterson, supra; Afro-American Pub. Co. v Jaffe, 366 F. 2d 649.

The libel of Dunn was much more vicious than the nine year old item in the gossip column comment in Belli v Orlando Daily Newspapers, Inc., supra, because in Dunn the published falsehoods were used as a political tool to interefere with the due processes of government in a constitutional election, Garrison v La., supra, at 216, because he was exercising his constitutional rights, as a candidate for Congress. New York Times, supra, at 720. "(A)t least since Ex parte Yarbrough, (1884, 4 S. Ct. 152), and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, Secs. 2 and 4 of the Constitution." U.S. v Classic, 61 S. Ct. 1031. See Lackey v U.S., 108 F. 114; U.S. v Stone, 188 F. 836.

Under similar pleadings, claim of privilege, and exhibition of actual malice, Belli (389 F. 2d 579, Cert. Den., 89 S. Ct. 88) and Goldwater (414 F. 2d 324, Cert. Den., 90 S. Ct. 701) were vindicated in the Federal Courts by an award of damages; Dunn brought suit in the Texas court system and by State action Newspapers was rewarded by summary judgment for effective political journalism used as its privileged "tool" in the conduct of its "Jaybird Election", superimposed upon Petitioner's constitutional rights and election, and the Constitution of the United States, as "The record discloses, *** as part and parcel of the Democrat Party, an organization existing under the Auspices of Texas Law", "Mr. Justice Clark, concurring, in Terry v Adams, Texas, 73 S. S. Ct. 809.

SEVENTH QUESTION Presents:

"A denial of constitutionally protected rights demands judicial protection; our oaths and office requires no more," Chief Justice Warren, Reynolds v Sims, 1964, 84 S. Ct. 1362, 1384.

The determination by Newspapers, who shall appear on the ballot and be voted for in the General Election is like unto a "Jaybird" Convention, and prohibited. Terry v Adams, 73 S. Ct. 806. The State of Texas cannot nullify constitutional rights by permitting a "private organization," or a monopolistic Newspapers to conduct and determine, who shall be a candidate in a constitutional election. U.S. v Reese, 92 U.S. 214. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strikes at the heart of representative government . . . Reynolds v Sims 84 S. Ct. 1362, 1378; U.S. v Classic, 61 S. Ct. 1031, 1042; Ex parte Siebold, 100 U.S. 371; U.S. v Saylor, 64 S. Ct. 1101; Yick Wo v Hopkins, 6 S. Ct. 1064, 1071.

"It is immaterial that the state does not control that part of this election process which leaves the Jaybirds to manage" . . . or Newspapers, Inc., to manipulate. Courts of Texas herein have upheld the practice by its summary judgment procedure to deny to Petitioner rights secured and guaranteed by the constitution. Political activity of Newspapers, Inc., herein complained, "has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern" by representation in Congress for the 11th District of Texas, as in the selection by the news media of the nominees of the National Political Conventions in 1968, whether at Miami or in Chicago. Combination of Newspapers, Inc., Democrat Party and State action through the judiciary "has deprived" Petitioner of his constitutional rights. Terry v Adams, supra, pp. 813-814; U.S. v Classic, supra; Nixon v Herndon, supra. Correction of this policy and practice is within the jurisdiction of the Supreme Court. Nixon v Condon, Tex. 1932, 52 S. Ct. 484. Baker v Carr, 82 S. Ct. 691, 699; Gray v Sanders, 83 S. Ct. 801, 808; Reynolds v Sims, supra; Powell v

McCormack, 89 S. Ct. 1944, 1959-1962. Question of race not involved. Swafford v Templeton, supra.

"State power," therefore, cannot be "used as an instrument for circumventing a federally protected right." Gomillion v Lightfoot, 81 S. Ct. 125, 130; Reynolds v Sims, supra, at 1884.

Mr. Justice Clark, as though speaking of similar Texas practices, and thinking of Nixon in Herndon, supra, (1927); Condon, supra, (1932), and Dunn, herein (1970), continues in Terry v Adams, 73 S. Ct., 818: "An old pattern in new guise is revealed by the record, although 'closely paralleling the structure of the Democratic Party, *** and *** 'unofficial in character.' "

"Any unjustifiable discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." Kramer v Union Free Sch. Dist., 89 S. Ct. 1886, at 1889.

Acts lawful may become unlawful when done to accomplish an unlawful end. U.S. v Reading Co., 33 S. Ct. 90.

"Accordingly when a state structures its electorial apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draws the constitutional safeguards into play. Smith v Allwright, supra, 64 S. Ct., at 865; Cf. U.S. v Classic, 61 S. Ct. 1031, 1942; Lane v Wilson, 59 S. Ct. 872, 876," Terry v Adams, 73 S. Ct. 808, 821. ". . . whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." N.A.A.C.P. v Alabama, 78 S. Ct. 1163, 1172; Harper v Virginia State Bd. of Education, 86 S. Ct. 1079, 1083; Avery v Midland County, 88 S. Ct. 1114.

"The Fourteenth Amendment requires that equal

protection to all must be given – not merely promised." Smith v Texas, 61 S. Ct. 164. "Here," again, "the Texas *** scheme *** is capable of being applied in such a manner as practically to proscribe any group thought by the laws' administrators to be undesirable." "Nor could chance and accident have been responsible for the combination of circumstances", both, before and after the fact of interference by Newspapers, Inc., with Independent Candidate's Constitutional Rights; and disposal of Petitioner's complaint therefor, and subsisting rights by the convenience of summary judgment.

In truth and fact, the overt acts, false publications and functions of Newspapers herein, under claim of privilege of the press were not a Fourth Step "in electorial process of Texas." It was the Master Plan for Control of the candidacy and participation of Independents superimposed upon the constitutionally protected General Election, "without reservation or limitations," Ex parte Yarbrough, supra; U.S. v Classic, supra, as a last resort, at the only effective place and election for such interference, since Independents are not subject to party controlled and rigged primary elections in Texas condemned in Terry v Adams, supra.

Courts of Texas by summary judgment should not be permitted to destroy the reason for resort to, participation in, and protection of constitutional elections.

" 'Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement *** must be carefully and meticulously scrutinized.' Reynolds v Sims, 84 S. Ct. 1362 ****." Kramer v Union Free Sch. Dist., 89 S. Ct. 1886, at 1889.

The courts cannot reject as "no law suit," a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority." Baker v Carr, 82 S. Ct. 691, at 710.

"The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of "demoralization of the court's authority." In re Oliver 68 S. Ct. 499, at 510. Or summary efficiency, Sartor v Ark. Nat. Gas Co., supra. "*** or in any way destroyed." Magna Carta, Chap. 39. "For the rights and values of *** personality far transcend mere personal interests. *** Society has a pervasive and strong interest in preventing and redressing attacks upon reputation," Mr. Justice Stewart, Rosenblatt v Baer, 86 S. Ct. at 679, 680.

Due process has to do with denial of fundamental fairness, shocking to the universal sense of justice; it deals with neither power nor with jurisdiction, but with its exercise. 16 Am. Jur. 2d p. 939, (Const. Law Sec. 546), citing Kinsella v U.S., 80 S. Ct. 297.

Daniel Webster in the Dartmouth College case, 4 L. Ed 629, 645 (1819), declared that due process of law means "the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." . . . And not before, as in Dunn v Newspapers, Inc.

"The concept of 'state action' has been considered in light of the degree to which a State has participated in depriving a person of a right. 'Judicial' action alone has been considered ample in hundreds of cases (where) 'state action' took place only by judicial action . . . Bell v Maryland, 84 S. Ct. 1814, 1831.

A constitutionally protected freedom cannot be infringed upon by judicial act "for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." N.A.A.C.P. v Alabama, 78 S. Ct. 1163, 1172; Id. 84 S. Ct. 1302; 1312.

Requirements of fair trial under the Fourteenth Amendment embrace those fundamental principles of liberty

and justice which lie at the base of all of our civil and political institutions; even though they have been specially dealt with in another part of the Federal Constitution." Powell v Alabama, 53 S. Ct. 55, 63; Gideon v Wainwright 83 S. Ct. 792, 795.

As Chief Justice Warren said, Washington v Texas, 87 S. Ct. 1920, 1922: "A person's right 'to his day in Court' (is) basic to our system of jurisprudence." "Trial by affidavit is no substitute for trial by jury which has long been the hall mark of 'even handed justice.'" Mr. Justice Clark, Poller v C.B.S., 82 S. Ct. 486.

"It must be kept in mind that this case has never been tried on its merits, but only on motion for summary judgment under Rule 166-A. The right to a summary judgment was unknown to common law and exists in this State only by virtue of that Rule. In order to be entitled to all of the benefits of the Rule, all of its terms must be complied with. This the defendants failed to do." Chief Justice Hickman, Tobin v. Garcia, 159 Tex. 58, 316 S.W. 2d 396. Page 5, Appellant's Brief, Court of Civil Appeals.

CONCLUSION

Petitioner submits that the New York Rule does not apply to him as a public official or figure, as he was not treated as such by Respondent Newspapers, and that the matter published was not of "legitimate and substantial interest" to be privileged under New York Times Co. v Sullivan, supra; Curtis v Butts, supra, at 1997; Rosenblatt v Baer, supra; and Belli v Orlando Daily Newspapers, Inc., supra.

Even, if the publications qualified for the alleged privilege, it was made with such obvious actual malice exhibited by the character and circumstances of Newspapers" acts and publications in alteration of ballots and fraudulently interfering in a constitutionally provided and protected election as to destroy alleged privilege and give Petitioner his cause of action in tort damages for wilfully and wrongfully interfering with his vote, election, reputation and constitutional rights.

Respectfully submitted,

LAUREL N. DUNN
2811 Old Robinson Rd.
Waco, Texas 76706

Laurel N. Dunn

Petitioner

CERTIFICATE OF SERVICE

A copy of this Petition has been personally delivered to Mr. M. Johnston, attorney for Respondent, 1st Natl. Bank Bldg., aco Texas.

Laurel N. Dunn
Petitioner

APPENDICES: SEPARATELY PRESENTED.